

STATE WATER CONTROL BOARD ENFORCEMENT ACTION

SPECIAL ORDER BY CONSENT

WITH

EAGLE HARBOR, L.L.C.

Permit No. VAR450678

Permit No. 99-1030

SECTION A: Purpose

This is a Consent Special Order issued under the authority of §62.1-44.15(8a) and §62.1-44.15(8d) of the Code of Virginia, between the State Water Control Board and Eagle Harbor, L.L.C. for the purpose of resolving certain violations of environmental law and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. “Code” means the Code of Virginia (1950), as amended.
2. “Board” means the State Water Control Board, a permanent citizens’ board of the Commonwealth of Virginia as described in the Code §§ 10.1-1184 and 62.1-44.7.
3. “Department” or “DEQ” means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in the Code § 10.1-1183.
4. “Director” means the Director of the Department of Environmental Quality.
5. “Order” means this document, also known as a Consent Special Order.
6. “Eagle Harbor” means Eagle Harbor, L.L.C., certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.
7. “TRO” means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.
8. “VPDES Regulations” means 9 VAC 25-31-10 *et seq.* - Virginia Pollutant Discharge Elimination System (VPDES) Permit Regulation.

9. “VPDES General Permit Regulations” means 9 VAC 25-180-10 *et seq.* – General Virginia Pollutant Discharge Elimination System Permit Regulation for Discharges of Storm Water from Construction Activities.
10. “VPDES Permit” means General VPDES Permit No. VAR450678.
11. “VWP Regulations” means 9 VAC 25-210-10 *et seq.* – Virginia Water Protection (VWP) Permit Program Regulation.
12. “VWP Permit” means VWP Permit No. 99-1030.

SECTION C: Findings of Fact and Conclusions of Law

Part I. VPDES Permit No VAR 450678

1. On February 7, 2001, DEQ received a complete registration statement from Eagle Harbor for a VPDES storm water general permit associated with construction activity of a residential/commercial development (a/k/a Eagle Harbor) located in Isle of Wight County, Virginia. Coverage under the VPDES Permit became effective March 19, 2001 and will expire June 30, 2004.
2. Eagle Harbor owns eight tracts, totaling approximately 420 acres, of the proposed Eagle Harbor residential/commercial development located in Isle of Wight County, Virginia. Total disturbed acreage for all eight tracts is unknown because Eagle Harbor has not developed and/or submitted final construction plans for each tract.
3. Section 62.1-44.5.A of the Code and §9 VAC 25-31-50.A. of the Regulations state: “Except in compliance with a permit...issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances.”
4. Section 62.1-44.5.B of the Code and §9 VAC 25-31-50.B of the Regulations state any person/permittee “who discharges or causes or allows a discharge of...wastes...into or upon state waters in violation of Part II.F, shall notify the Department of the discharge immediately upon discovery of the discharge, but in no case later than 24 hours after said discovery.”
5. Part II.A of the Permit requires Eagle Harbor to develop a storm water pollution prevention plan (SWP3) prior to the submittal of the registration statement and to implement and provide for compliance with the terms and schedule of the plan beginning with the initiation of construction activities. Eagle Harbor claims their Erosion and Sediment (E&S) Control Plan was serving as the SWP3. Under Part II of the Permit, the E&S Plan can serve as the SWP3 provided it meets or exceeds the storm water pollution prevention plan requirements of Part II.D of the Permit.
6. Part III.L of the VPDES Permit states: “The permittee shall comply with all conditions of this permit.”
7. On December 13, 2002, Compliance Staff observed three unauthorized discharges of sediment-laden water flowing off Tract 2 of Eagle Harbor and into the wetlands bordering Ragged Island Creek. These unauthorized discharges were not reported to DEQ.

8. On December 17, 2002, Compliance Staff reviewed the E&S Control Plan and found the following SWP3 components had not been implemented and/or included in the SWP3:
 - a. Part II.D.2a (1)(b) of the VPDES Permit requires Eagle Harbor to install and maintain erosion and sediment controls. On December 13 and 17, 2002, and February 24 and 28, 2003, Compliance Staff observed that E&S controls were not installed and/or maintained; stockpiles were not correctly maintained, stabilized, and /or protected with sediment trapping devices.
 - b. Part II.D.2a (2) of the VPDES Permit requires Eagle Harbor to maintain a record of dates when major grading activities occur, when construction activities temporarily or permanently cease on a portion of the site, and when stabilization measures are initiated. The record shall be maintained and included in the SWP3. Documentation of major grading activities and initiation of stabilization measures and contractor and subcontractor certifications were not recorded in the SWP3 until February 28, 2003.
 - c. Part II.D.2c (2) of the VPDES Permit requires Eagle Harbor to make provisions to minimize the transport of sediment by vehicular tracking onto paved surfaces. On December 13 and 17, 2002, Staff observed significant accumulations of sediment on public roads within Eagle Harbor.
 - d. Part II.D.4 of the VPDES Permit requires Eagle Harbor to perform and document site inspections at least once every fourteen calendar days and within 48 hours of the end of a storm event that is 0.5 inches or greater. Eagle Harbor did not perform and/or document inspections from March 19, 2001 to January 1, 2003.
 - e. Part III.J.1 of the VPDES Permit requires Eagle Harbor to notify the Department of any planned physical alterations or additions to the permitted facility. On February 24, 2003, Compliance Staff observed that construction activity had commenced on Tract 1 without prior notification to DEQ.
9. On February 3, 2003 and March 17, 2003, DEQ issued Eagle Harbor Notice of Violation No. W2003-01-T-0004 and W2003-03-T-0001, respectively, for the above mentioned violations.

Part II. VWP No. 99-1030

1. On October 27, 2000, DEQ issued the VWP Permit to Eagle Harbor; this Permit was later modified on July 17, 2001. The Permit authorizes a total of 9.38 acres of permanent wetland impacts and requires 18.76 acres of wetland compensation. 1.56 acres of compensation are satisfied by preserving upland buffers. The remaining 17.2 acres of compensation is to be satisfied by off-site wetlands creation.

2. Section 9 VAC 25-210-50.A of the VWP Regulations state: "Except in compliance with a VWP permit, no person shall...discharge any pollutants into, or adjacent to surface waters..."
3. Part II.A of the VWP Permit states: "The permittee shall comply with all conditions of the permit."
4. Part I.F.1 of the VWP Permit requires Eagle Harbor to notify DEQ "in writing ten days prior to and following commencement of work in wetlands or waters of the State on each of the proposed property tracts so that site inspections can be performed to ensure appropriate measures are in place to protect these resources." Based on a February 24, 2003 inspection, DEQ observed wetlands on Tract 1 had been impacted during clearing and construction of a roadway entrance. Eagle Harbor notified DEQ of this work on February 26, 2003.
5. Part I.F.2 of the VWP Permit states: "At least 60 days prior to commencement of work in wetlands and/or State waters, final project construction/design plans shall be submitted to this office for review and approval." On February 24, 2003, DEQ inspected the site and observed that construction activity had started on Tract 1 without final plan approval from DEQ.
6. Part I.F.3 of the VWP Permit states: "All work shall be done in such a manner as to minimize sedimentation/siltation of State Waters in accordance with Virginia Erosion and Sedimentation Regulations and the most recent edition of the Department of Conservation and recreation's Erosion and Sedimentation Control Handbook." On inspections conducted on December 13 and 17, 2002, and February 24 and 28, 2003, and March 6, 2003 DEQ observed that erosion and sediment controls were installed incorrectly, not maintained, or nonexistent, which allowed the unauthorized discharge of sediment-laden water to enter buffer areas and adjacent wetlands on Tracts 2, 5, 7, and 9.
7. Part I.F.4 of the VWP Permit states: "Wetland limits in non-impact areas within 50 feet of land disturbance activities, and wetland buffer boundaries must be clearly flagged prior to start of construction and contractors must be made aware of their existence prior to disturbance." Part I.F.10 of the VWP Permit states: "Signs shall be utilized to permanently mark all preserved wetlands and buffer areas, and to prohibit their disturbance." On December 13 and 17, 2003, January 8, 2003, and February 24, 2003, site inspections revealed that flagging and signage was not provided and/or nonexistent prior to the commencement of construction activity on Tracts 1, 2, 4, 5, 7, and 9.
8. Part I.G.4 of the VWP Permit states: "Compensation for wetland impacts must be provided prior to initiation of associated impacts, on a tract by tract basis." On January 8, 2003 and February 24, 2003, DEQ found that compensation was not provided prior to permanent impacts for 0.09 acres of wetlands on Tract 2, and 0.138 acres of wetlands on Tract 1, respectively.
9. On February 5, 2003 and April 8, 2003, DEQ issued Eagle Harbor Notice of Violation No. 03-01-TRO-002 and No. 03-04-TRO-002, respectively, for the above mentioned violations.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code § 62.1-44.15(8a) and (8d), orders Eagle Harbor, and Eagle Harbor voluntarily agrees, to pay a civil charge of \$23,000 within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall include Eagle Harbor's Federal Identification Number and shall note on its face that the payment is being made in accordance with the requirements of this Order. Payment shall be made by check, certified check, money order, or cashier's check payable to the "Treasurer, Commonwealth of Virginia," delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, Virginia 23240

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Eagle Harbor, for good cause shown.
2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the Notices of Violation issued to Eagle Harbor by DEQ on February 3 and 5, 2003, March 17, 2003, and April 8, 2003. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.
3. For purposes of this Order and subsequent actions with respect to this Order, Eagle Harbor admits the jurisdictional allegations, but does not admit the factual findings, and conclusions of law contained herein.
4. Eagle Harbor consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Eagle Harbor declares it has received fair and due process under the Administrative Process Act, Va. Code §§2.2 - 4000 *et seq.*, and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.
6. Failure by Eagle Harbor to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing

herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of this Order is found unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Eagle Harbor shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. Eagle Harbor shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Eagle Harbor shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within three (3) days of learning of any condition above, which Eagle Harbor intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto; their successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Eagle Harbor. Notwithstanding the foregoing, Eagle Harbor agrees to be bound by any compliance date, which precedes the effective date of this Order.
11. This Order shall continue in effect until Eagle Harbor petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order. In addition, the Director or the Board may terminate this Order, for good cause upon 30 days' written notice to Eagle Harbor. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Eagle Harbor from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.
12. By its signature below, Eagle Harbor voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of _____, 2003.

Francis L. Daniel, Tidewater Regional Director for
Robert G. Burnley, Director
Department of Environmental Quality

Eagle Harbor voluntarily agrees to the issuance of this Order.

By: _____

Date: _____

Commonwealth of Virginia

City/County of Isle of Wight, VA

The foregoing document was signed and acknowledged before me this ____ day of
_____, 2003, by _____, who is

_____ of Eagle Harbor, on behalf of the Corporation.
(title)

Notary Public

My commission expires: _____.

APPENDIX A

Eagle Harbor, L.L.C.

Eagle Harbor shall:

1. Mail all submittals and reports required by this Appendix A to:
Francis L. Daniel, Regional Director
DEQ, Tidewater Regional Office
5636 Southern Blvd.
Virginia Beach, VA 23462
2. Comply with all the provisions of the VPDES and VWP Permit.
3. By March 1, 2004, complete the wetlands mitigation in accordance with the Permit.
4. Notify DEQ by certified letter that the wetlands mitigation has been completed within 10 days of completion.